KURBAN ALI SHAH SYED AHMAD ALI SHAH

v.

PACIFIC & ORIENT INSURANCE CO SDN BHD

HIGH COURT MALAYA, IPOH
PS GILL J
[CIVIL APPEAL NO: 12-37-97]
27 JULY 2001

CONTRACT: *Guarantee - Guarantor - Notice of demand - Whether there was evidence of service of such notice - Liability of guarantor - Whether demand notice is condition precedent to liability under guarantee - Whether filing and service of writ constitute sufficient demand - Public Bank Bhd. v. Chan Siok Lie & Ors*

In this appeal, the court considered the defendant's/guarantor's submission that there was no evidence that a notice of demand was sent to the guarantor prior to the commencement of this action, against the guarantor. The defendant contended that in the absence of evidence of posting by the plaintiff of the said notice pursuant to the letter of guarantee and indemnity (the "guarantee"); it followed, therefore, there was no obligation to pay.

Held:

[1] Following *Public Bank Bhd v. Chan Siok Lie & Ors* and on perusing the guarantee, the defendant had agreed to be the principal debtor and not just a surety. There were no words in this guarantee that made a prior demand on the guarantors, a condition precedent to liability.

[1a] Thus, the plaintiff by the terms of this guarantee was entitled to look to the defendant as a principal debtor for payment of the present debt, as opposed to a collateral debt, and without having to give the defendant a prior notice of demand in respect of any default having been made by the defendant. The plaintiff's inability to prove evidence of service of the notice of demand was of no consequence. The filing and service of the writ on the defendant in this instance, constituted sufficient demand obliging the defendant to pay.

[Defendant's/guarantor's appeal dismissed with costs.]

Case(s) referred to:

Kwong Yik Bank Bhd v. Transbuilder Sdn Bhd & Ors [1989] 1 CLJ 34; [1989] 2 CLJ (Rep) 34 ***(foll)***

Mok Hin Wah & Ors v. UMBC [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 ***(not foll)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank [1989] 3 MLJ 155 ***(not foll)***
Public Bank Bhd v. Chan Siok Lie & Ors [1989] 2 MLJ 305 ***(foll)***

For the appellant - Miss Nasha; M/s RJ Esa & Co
For the respondent - Mary Lim; M/s Selvam Nanda & Partners

Reported by Raja Vishnu Sivarajah

JUDGMENT

PS Gill J:

The issue to be determined in the present appeal, is whether a demand notice, is a condition precedent, to a liability under a guarantee. The principal argument of the defence counsel on appeal, was that there was no evidence that a notice of demand was sent to the guarantor prior to the commencement of this action, against the guarantor. The defence counsel relied on cl. (f) of the letter of guarantee and indemnity, wherein, it is held, that any notice required to be served pursuant to this guarantee and indemnity shall be in writing, and shall be sufficiently served on the parties hereto by hand, or prepaid registered post, at the respective addresses.

The defence counsel went on to submit that there was no evidence of such posting of the requisite notice of demand pursuant to cl. (f) of the letter of guarantee and indemnity. Counsel argued that since no prior demand has been made on the defence under the guarantee and indemnity agreement, there was no obligation to pay.

The plaintiff's counsel admitted there was no cogent evidence of service by posting of the said notice of demand, but submitted that such a notice of demand was in fact sent to the defendant.

The defence counsel would be correct in her assertion on the need that a demand is a condition precedent to liability under a guarantee, if by the terms of the letter of guarantee and indemnity, the parties have made it a condition, that before an obligation to pay under the guarantee can arise, there should first be a demand for payment made on the guarantee. The defence no doubt relies on the authorities of *Mok Hin Wah & Ors v. UMBC* [1987] 2 CLJ 197 and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank* [1989] 3 MLJ 155 which are to the effect, that if by the terms of a guarantee, a demand on a guarantor is a requirement, a proper demand must be made on a guarantor and such a demand is a *sine qua non* to establishing a claim against a guarantor. The critical issue here is whether the terms of the present guarantee and indemnity, impose on the plaintiff such a requirement.

Learned counsel for the defendant had drawn my attention to cl. (f) of the letter of guarantee and indemnity, which she contends makes a demand, a condition precedent. Clause (f) of the said letter of guarantee and indemnity states:

> (f) agree that any notice required to be served pursuant to this Guarantee and Indemnity shall be in writing and shall be sufficiently served on the parties hereto by hand or prepaid registered post at the respective addresses as stated herein or the last known address of the addressee and any notice served by registered post shall be deemed to have been received by the addressee when it ought in the ordinary course of post to be delivered to the address to which it was sent.

Miss Mary Lim, counsel for the plaintiff in her rebuttal submission maintained that there was scarcely anything to suggest in cl. (f) that a demand is a prerequisite, to the liability of the defence. She also went on to submit that the demand this court is concerned with in this appeal, is not what can be referred to as a "demand guarantee", and this becomes patently clear when the other clauses of the said letter of guarantee and indemnity are read.

In the course of my deliberations I come upon two authorities namely *Public Bank Bhd v. Chan Siok Lie & Ors* [1989] 2 MLJ 305 and *Kwong Yik Bank Bhd v. Transbuilder Sdn Bhd & Ors* [1989] 1 CLJ 34. In the case of *Public Bank Bhd v. Chan Siok Lie & Ors (supra)* Shankar, J (as he then was) cautioned that the case of *Mok Hin Wah & Ors v. UMBC* [1987] 2 CLJ 197, should be applied with care as *Mok Wah*'s case will only apply if the words of the guarantee specially make a prior demand a condition precedent to suing the guarantor. Shankar, J then went on to say at p. 308.

> ... There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a *sine qua non* to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases. The writ itself is a notice: See *Malayan Banking Bhd v. Lim Ghee Leng* ...
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> A far clearer exposition of the law on the point is given in *O'Donovon's Modem Law of Guarantee* at pp 379-382 ... At p 380 of the text it says that even though the amounts under the guarantee are expressed to be payable 'on demand', the inclusion of a 'principal debtor' clause in the body of a guarantee may obviate the necessity for the creditor to make a demand ... Thus I hold, that where the effect of a guarantee agreement is to make the guarantors principal debtors, the necessity for a demand could be obviated because the character of the agreement under which payment is sought is no longer strictly collateral.

Bearing in mind the aforesaid authority, and on perusing the said letter of guarantee and indemnity, it is "plain as pikestaff" that the defendant/guarantor, in this instance, had agreed to be the principal debtor, and not just surety (please refer to clause (a)). There was not a hint or suggestion that the letter of guarantee and indemnity in this instance, is an "on demand" guarantee. The wording of the letter of guarantee and indemnity as a whole, in my view makes it apparent that there are no words in any of the clauses in this guarantee, which makes a prior demand on the guarantors, a condition precedent to liability. Thus said, the plaintiff by the terms of this letter of guarantee and indemnity is clearly entitled to look to the defendant as principal debtor for payment of the present debt, as opposed to a collateral debt, and without having to give the defendant a prior notice of demand in respect of any default having been made by the defendant.

In the above circumstances, it is my considered view that this letter of guarantee or indemnity is not a "demand guarantee" and I find that the plaintiff's inability to prove evidence of service of this said notice of demand is of no consequence. The filing and service of the writ on the defendant in this instance constituted a sufficient demand obliging the defendant/guarantor to pay. The submission in this respect of the defence counsel should by sheer perforce fail, leaving me with no alternative, but to dismiss the appeal of the defendant/guarantor with costs.